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STATE OF SOUTH CAROLINA)
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(Caption of Case))

Application of Utilities Services of South Carolina, Inc. for adjustment of rates and charges and modifications to certain terms and conditions for the provision of water and sewer service.)
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BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

COVER SHEET

DOCKET NUMBER: 2007 - 286 - WS

(Please type or print)
Submitted by: John M. S . Hoefer

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DOCKETING INFORMATION (Check all that apply)

☐ **Emergency Relief demanded in petition**

☐ **Request for item to be placed on Commission's Agenda expeditiously**

☐ **Other:**

INDUSTRY (Check one)

- ☐ Electric
- ☐ Electric/Gas
- ☐ Electric/Telecommunications
- ☐ Electric/Water
- ☐ Electric/Water/Telecom.
- ☐ Electric/Water/Sewer
- ☐ Gas
- ☐ Railroad
- ☐ Sewer
- ☐ Telecommunications
- ☐ Transportation
- ☐ Water
- ☒ Water/Sewer
- ☐ Administrative Matter
- ☐ Other:

NATURE OF ACTION (Check all that apply)

- ☐ Affidavit
- ☐ Agreement
- ☐ Answer
- ☐ Appellate Review
- ☐ Application
- ☐ Brief
- ☐ Certificate
- ☐ Comments
- ☐ Complaint
- ☐ Consent Order
- ☐ Discovery
- ☐ Exhibit
- ☐ Expedited Consideration
- ☐ Interconnection Agreement
- ☐ Interconnection Amendment
- ☐ Late-Filed Exhibit
- ☐ Letter
- ☐ Memorandum
- ☐ Motion
- ☐ Objection
- ☐ Petition
- ☐ Petition for Reconsideration
- ☐ Petition for Rulemaking
- ☐ Petition for Rule to Show Cause
- ☐ Petition to Intervene
- ☐ Petition to Intervene Out of Time
- ☐ Prefiled Testimony
- ☐ Promotion
- ☐ Proposed Order
- ☐ Protest
- ☐ Publisher's Affidavit
- ☐ Report
- ☐ Request
- ☐ Request for Certification
- ☐ Request for Investigation
- ☐ Resale Agreement
- ☐ Resale Amendment
- ☐ Reservation Letter
- ☐ Response
- ☐ Response to Discovery
- ☐ Return to Petition
- ☐ Stipulation
- ☐ Subpoena
- ☐ Tariff
- ☒ Other: Copy of Notice filed w/Sup. Ct.

Print Form Reset Form

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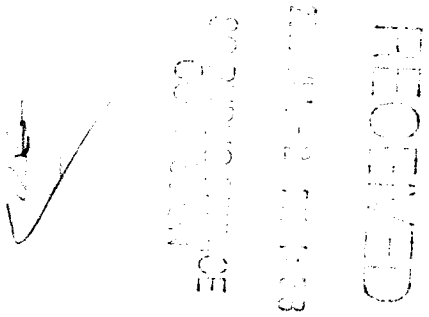

VIA HAND DELIVERY
Daniel E. Shearouse
Clerk of Court
The South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

RE: Utilities Services of South Carolina, Inc. v. The South Carolina Office of Regulatory Staff;
S.C. Public Service Commission Docket No.: 2007-286-WS

Dear Mr. Shearouse:

Enclosed for filing please find the original and one (1) copy of a Notice of Appeal on behalf of Utilities Services of South Carolina, Inc. ("USSC") from certain orders of the Public Service Commission of South Carolina ("Commission") in the above-referenced docket.

By copy of this letter, I am serving the South Carolina Office of Regulatory Staff with a copy of this Notice and enclose a certificate of service to that effect. Also enclosed please find our check in the amount $100 for the filing fee. Also by copy of this letter, I am filing a copy of this Notice with the Clerk and Chief Administrator of the Commission.

I would appreciate your acknowledging receipt of these enclosures by file stamping the extra copy of the Notice and returning it to me via our courier.

(Continued . . .)

If you have any questions, or require additional information, please do not hesitate to contact me. With best regards, I am,

Respectfully,

WILLOUGHBY & HOEFER, P.A.

John M.S. Hoefer

JMSH/cf
Enclosure

cc: Hon. Charles L.A. Terreni (via first-class mail with enclosures)
Florence P. Belser, Esquire (via first-class mail with enclosures)
Jeffrey M. Nelson, Esquire (via first-class mail with enclosures)
Nanette S. Edwards, Esquire (via first-class mail with enclosures)

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

Docket No. 2007-286-W/S

Utilities Services of South Carolina, Inc., ... Appellant,

v.

The South Carolina Office of Regulatory Staff, ... Respondent.

NOTICE OF APPEAL

Appellant, Utilities Services of South Carolina, Inc. ("USSC"), appeals the following orders of the Public Service Commission of South Carolina ("Commission") in its Docket No. 2007-286-W/S: Order No. 2008-96 dated February 11, 2008, and Order No. 2009-353 dated May 29, 2009. Copies of the Orders are attached hereto as Exhibits "A" and "B", respectively. USSC received written notice of entry of the order attached as Exhibit "B" on June 2, 2009.

SIGNATURE PAGE FOLLOWS

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Columbia, South Carolina
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BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2007-286-WS – ORDER NO. 2008-96

FEBRUARY 11, 2008

IN RE: Application of Utilities Services of South Carolina, Inc. for Adjustment of Rates and Charges and Modifications to Certain Terms and Conditions for the Provision of Water and Sewer Service.	ORDER DENYING INCREASE IN RATES AND CHARGES

I. INTRODUCTION

This matter comes before the Public Service Commission of South Carolina ("the Commission") on an Application for approval of a new schedule of rates and charges for water and sewer services ("Application") filed by Utilities Services of South Carolina, Inc. ("USSC" or the "Company"). USSC's service area includes portions of Abbeville, Anderson, Lexington, Richland, Saluda, and York Counties. According to USSC's Application, water supply and distribution services were provided to 6,854 residential and commercial customers, and wastewater collection and treatment services were provided to 376 residential and commercial customers. This Commission approved a revenue increase of $614,708 pursuant to Order No. 2006-22, dated January 19, 2006. The Company now seeks approval of additional revenues of $772,965, based on the proposed Orders submitted by the parties in this case.

USSC's Application and Proposed Schedule of Rates and Charges were filed with the Commission on August 6, 2007. No parties filed Petitions to Intervene in this matter.

The Commission instructed USSC to publish a prepared Notice of Filing in a newspaper of general circulation in the areas affected by USSC's Application. The Notice of Filing indicated the nature of the Application and advised all interested persons desiring to participate in the scheduled proceedings of the manner and time in which to file appropriate pleadings for inclusion in the proceedings. In the same correspondence, the Commission also instructed USSC to notify each customer affected by the Application. USSC furnished the Commission with an Affidavit of Publication demonstrating that the Notice of Filing had been duly published and with a letter in which USSC certified compliance with the Commission's instruction to mail a copy of the Notice of Filing to all customers affected by the Application. The Commission issued a Notice of Filing and Hearing in this matter on August 17, 2007, setting this matter for a full hearing before the Commission on December 13, 2007.

On September 27, 2007, the Commission issued Order No. 2007-673 granting a request for local public hearings and ordered the Commission Staff to set public hearings in Anderson and York Counties. Under this Order, public hearings were set and noticed by the Commission to be held in York County at Rock Hill City Hall on November 5, 2007, and at the Anderson County Library on November 7, 2007. The Commission received sworn public testimony from customers of the Company at these two public hearings and also at the hearing in the Commission's offices on December 13, 2007.

Between the filing of the Company's Application and the date of the hearing, the Office of Regulatory Staff (ORS) made on-site investigations of USSC's facilities, examined USSC's books and records, and gathered detailed information concerning USSC's operations.

On December 13, 2007, a hearing concerning the matters asserted in USSC's Application was held in the Commission's hearing room located at Synergy Business Park, 101 Executive Center Drive, Saluda Building, Columbia, S.C. The full Commission, with Chairman O'Neal Hamilton presiding, heard the matter of USSC's Application. John M. S. Hoefer, Esquire, and Benjamin P. Mustian, Esquire, represented USSC. Jeffrey Nelson, Esquire, and Shealy Reibold, Esquire, represented the Office of Regulatory Staff. David Butler, Esquire, served as legal counsel to the Commission.

At the outset of the December 13, 2007 hearing, the Commission heard testimony from additional public witnesses. A total of five public witnesses testified at that hearing.

USSC also presented the testimony of Pauline M. Ahern (Principal of AUS Consultants), Dr. B.R. Skelton (consultant regarding rate of return), Lena Georgiev (Senior Regulatory Accountant at Utilities, Inc.), and Bruce T. Haas (Regional Director of Operations for Utilities Services of South Carolina, Inc.). ORS provided the testimony of Paul B. Townes (Audit Manager), Willie J. Morgan (Program Manager), and Dr. Douglas Carlisle (Economist).

In considering the Application of USSC, the Commission must consider competing interests; the interests of the customers of the system in receiving quality service and a quality product at a fair rate, as well as the interest of the Company to have the opportunity to earn a fair rate of return. Balancing those interests in the present case,

this Commission believes that the interests of the customers of the system in receiving quality service and a quality product at a fair rate have been addressed by the public witnesses, while the Company has failed to adequately present a case for a change in the level of revenues approved in Order No. 2006-22. The Company has failed to meet its burden of proof in several respects, and it has failed to provide this Commission with sufficient information to show measures that it has taken to justify a rate increase since the Company's last rate case, especially in view of the continuing complaints with regard to quality of service by the Company's customers. Although the Company has submitted into the record various dollar amounts allegedly expended by the Company on capital improvements, plant additions, and repairs, the Company has failed to identify for the most part where the expenditures were made, or how such expenditures contributed to improved service. Further, Company testimony referred to some specific improvements made to the Company's systems, but failed to identify the particular systems affected. In addition, the Company has failed to provide required information regarding affiliate transactions with its affiliate Bio-Tech, and has failed to provide evidence on at least one violation of South Carolina Department of Health and Environmental Control (DHEC) standards. Lastly, the Company has failed to support its request for a rate increase to its distribution-only customers. When examined as a whole, we believe that these omissions constitute a failure to meet the burden of proof on the part of the Company. For this reason, we deny and dismiss the Company's application in this case. Further discussion follows.

II. USSC OBJECTION TO CUSTOMER TESTIMONY

The Commission heard from the public at three hearings. At the first public hearing on November 5, 2007, USSC raised an objection to the Commission receiving and relying upon customer testimony, documents, and related exhibits "consisting of unsubstantiated complaints regarding customer service, quality of service, or customer relation issues." The Company renewed this objection at the hearings on November 7, 2007, and December 13, 2007. Tr. 1 at 9-10; Tr. 2 at 13; Tr. 3 at 6. Through this objection, USSC claims reliance on such testimony denies it due process of law, permits customers to circumvent complaint procedures, and is an inappropriate basis for the adjustment of just and reasonable rates. Id. In support of these arguments, USSC cites Patton v. Public Service Commission, 280 S.C. 288, 312 S.E.2d 257 (1984), the Order in the Court of Common Pleas in Tega Cay Water Service v. S.C.P.S.C., C/A No. 97-CP-40-0923 (September 25, 1998), and the Commission's Order No. 1999-191 in Application of Tega Cay Water Service, Inc, Docket No. 96-137-WS. Id.

However, these cases do not support USSC's general argument that the Commission has denied it due process, nor do the cases stand for the proposition that the Commission's complaint process was unlawfully circumvented when the Commission heard public testimony regarding customer service complaints. With one exception to be discussed infra, the Company's objection must be overruled.

First, there has been no due process violation. The Company had the opportunity to file responses to its customers' testimony, and it did so. USSC Letter (dated December 10, 2007). See also Haas Conditional Direct Testimony. Tr. 3 at 215. In addition, the

Company had the opportunity to cross-examine witnesses and took advantage of that opportunity. Tr. 1 at 48, 51, 65, 76; Tr. 2 at 58, 67, 72; Tr. 3 at 14, 45, 49.

Second, no circumvention of complaint procedures occurred. The evening public hearings held in this case were for the express purpose of garnering public opinion regarding the proposed rate increase. In a rate proceeding, "quality of service" is a long-established element of what this Commission must consider in arriving at just and reasonable rates for the Company. See Patton v. Public Service Commission, supra. Consideration of customers' complaints regarding the Company's service is a component of "quality of service." Furthermore, nothing in the Commission's statutory authority or regulations indicates that the customer complaint-filing process is the exclusive vehicle for raising issues regarding a company's quality of service. See 26 S.C. Code Ann. Regs. 103-824 (Supp. 2007).[1]

It is ORS' position that the challenged customer testimony is admissible in these proceedings. Tr. 1 at 10-11; Tr. 2 at 13-14; Tr. 3 at 6. The ORS also argues that the cases cited by USSC fail to support its grounds for objection. Id. In addition, ORS requested that USSC submit letters to the Commission specifying objectionable portions of public testimony and the specific reasons for its opposition.[2] Id.

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[1] The regulation states in pertinent part: "Any person complaining of anything done or omitted to be done by any person under the statutory jurisdiction of the Commission in contravention of any statute, rule, regulation or order administered or issued by the Commission, may file a written complaint with the Commission, requesting a formal proceeding..." S.C. Code Ann. Regs. 103-824 (Supp.2007).

[2] On December 10, 2007, USSC responded to ORS's request to produce a letter specifying its objections to certain public testimony and the reasons for its opposition by filing a letter with the Commission. In this letter, USSC restates its continuing objection to public testimony for the reasons that it denies due process and unlawfully circumvents complaint procedures. It then proceeds to simply designate the witness' testimony and exhibits that it opposes under this blanket objection. In the letter's closing, without referencing specific witnesses, USSC states general reasons for the objection, which include assertions that "customers' testimony does not reflect the timeframe of the issues complained of,

The Commission holds that public testimony may be admitted into the record of these proceedings. The cases cited by USSC merely stand for the principle that, while customer service is a factor to be considered in determining a reasonable rate of return in a rate proceeding, a reduction in rates based on poor quality of service must be supported by substantial evidence in the record, must not be confiscatory, and must remain within a fair and reasonable range. Patton, 312 S.E.2d at 260 ("the Commission must be allowed the discretion of imposing reasonable requirements on its jurisdictional utilities to insure that adequate and proper service will be rendered to the customers of the utility companies."). Each of the cases cited by USSC is discussed in greater detail below.

In Patton, the South Carolina Supreme Court affirmed the premise that quality of service is, necessarily, a factor among other considerations in determining a just and reasonable operating margin when approving a rate increase. Id. (citing State Ex rel. Util. Com'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974)). In this case, a company offering sewerage services appealed a Commission's rate determination that approved a lower rate increase than what the company requested. Id. The South Carolina Supreme Court found that "the determination of a fair operating margin is peculiarly within the province of the Commission and cannot be set aside in the absence

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whether the customers complained to the company, or whether the customers filed a formal complaint with the Commission." It ends by stating that the number of customers heard at the public hearings is a small percentage of its customers, and it considers this level of customer complaints as "de minimis and immaterial."

As a state agency charged with setting rates that are just and reasonable, the South Carolina Public Service Commission considers all customer complaints in some fashion. This consideration of public testimony is most readily apparent in Hilton Head Plantation Utilities v. The Public Service Commission of South Carolina, 312 S.C. 448, 441 S.E.2d 321 (1994), where the Commission's denial of a water company's rate increase, based in part on the testimony of only one customer, was upheld by South Carolina's Supreme Court. At a minimum, such testimony has the potential of making the Commission aware of areas in which a company needs to provide more evidence before granting a rate increase.

of showing that it is unsupported by substantial evidence in the record." Id. at 259. To reach this finding, the Court noted that S.C. Code Ann. § 58-5-210 (1976) vests the Commission with authority to supervise and regulate the rates and service of every utility in the state. It concluded that substantial evidence in the record existed to support the Commission's concern regarding the Company's quality of service.

The Company's next cited opinion, the Order of the Court of Common Pleas in Tega Cay Water Service v. S.C.P.S.C. resulted from an appeal by Tega Cay Water Services, Inc. of Commission Order No. 96-879 (the "TCWS Order"). This Circuit Court opinion restricts the Patton holding by maintaining that customer testimony related to poor quality of service, if not corroborated by other substantial evidence in the record, fails to support a Commission order giving an insufficient rate of return. The operating margin in the TCWS case was 0.23%, which prevented the utility from recovering expenses and the capital costs of doing business, according to the Court. TCWS Order at 6.

In the TCWS case, the Commission admitted that the Company's return was insufficient but argued that such a low return was warranted by customer complaints about the quality of service rendered by the Company. Id. However, the Circuit Court stated that the Commission made this determination solely on the complaints of six customers out of a total customer base of 1,500 people, despite the Commission's staff finding that TCWS provided acceptable service. Id. at 2-7. The Circuit Court held that these six customer complaints were not sufficient, alone, to support the Commission's determination. It further held that the Commission may not credit testimony such as

"dirty water" as evidence of poor service quality, and must explicitly find the service was substandard according to some ascertainable criteria. See Id. at 7-8.

In reversing the Commission's Order, the Circuit Court went on to state that the Commission failed to satisfactorily provide a standard for determining what constitutes adequate service or indicate what increases in rates would have been approved had the services been found adequate. Id. at 8. It remanded the case with instructions for the Commission to set a rate that was not confiscatory and remained within a fair and reasonable range. See Id. at 6-7, 9. On remand in Order No. 1999-191, the Commission avoided relying on customer complaints. Order on Remand at 1.

The logic of the actual holdings in the cases cited by USSC is evident after considering the standard of review the Commission is held to in the appellate process. Justice Harwell stated the standard of review succinctly in Patton v. Public Service Commission:

> Pursuant to S.C. Code Ann. § 1-23-380 (1982), a court may not substitute its judgment for that of the Commission as to the weight of the evidence on the question of fact. The findings of the Commission are presumptively correct and have the force and effect of law. South Carolina Electric and Gas Co. v. Public Service Commission, 275 S.C. 487, 272 S.E.2d 793 (1980). Therefore, the burden of proof is on the party challenging an order of the Commission to show that it is unsupported by substantial evidence and that the decision is clearly erroneous in view of the substantial evidence on the whole record. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). The Public Service Commission is recognized as the "expert" designated by the legislature to make policy determinations regarding utility rates; thus the role of the court reviewing such decisions is very limited. See, e.g. Southern Bell Tel. and Tel. Co. v. Public Service Comm., 270 S.C. 590, 244 S.E.2d 278 (1978) 312 S.E.2d at 259.

Under this standard of review, it is necessary for the Commission to base its findings on substantial evidence that is supported by the record in order for courts to look

back and know that Commission decisions are grounded on fact. With this mandate in mind, the Commission does not agree with USSC's apparent argument that these cases stand for the proposition that the Commission is not entitled to consider the testimony and evaluate the credibility of public witnesses in the ratemaking process. USSC essentially argues that the testimony of public witnesses is "unsubstantiated" and therefore may not be considered. Tr. Vol. 1 at 9-10; Tr. Vol. 2 at 13; Tr. Vol. 3 at 6. However, neither the cases cited by USSC, nor other precedents in rate cases support such a conclusion. If this argument was accepted, there would be no purpose for public hearings, admittedly a result advantageous to a company such as USSC, which has been subjected to a great deal of criticism by its customers, but also a result which is contrary to Supreme Court precedent, which has recognized the role of public testimony in the ratemaking process. Patton, 312 S.E.2d at 260; Seabrook Island Property Owners Association v. South Carolina Public Service Commission, 303 S.C. 493, 401 S.E.2d 672, 675 (1991) (stating "It is incumbent upon the PSC to approve rates which are just and reasonable...considering the price at which the company's service is rendered and the quality of that service.")

Accordingly, we overrule the Company's objection, with one exception. During the public portion of the hearing held on December 13, 2007, the Company objected to any testimony of John T. Snavely, who asserted that, because he was a customer of the utility, he should automatically be a party to the case. USSC asserted that Snavely had not petitioned the Commission to intervene as a party in this matter and that no such intervention had been granted. We agree that Mr. Snavely was not automatically a party in this matter by virtue of his being a customer. Further, however, the Company stated

that in order for a person to interject legal argument before the Commission, he or she must be admitted as a party of record and represented by counsel admitted to practice in South Carolina. Although we note that Mr. Snavely referred to the term "due process" in his statements to the Commission, we believe that his point about the timing of the prefiling of testimony and the public hearings and other comments may as well be construed as comment on the Commission's conduct of this case. He was certainly entitled to express his opinions on the procedural issue and make any other relevant statements with regard to the case under our regulations without being admitted as a party of record. We therefore overrule the remainder of the Company's objection to Mr. Snavely's testimony. Although Mr. Snavely could not be a party to the proceeding under the circumstances, his testimony will remain in the record.

III. THE COMPANY FAILED TO MEET ITS BURDEN OF PROOF

A. CAPITAL IMPROVEMENTS

Although the Company presented general testimony through witness Bruce Haas about capital improvements, the testimony was by and large non-specific as to location or what systems were improved. For example, at Tr. Vol. 3 at 206, 210, and 253, Haas testifies that the Company employs a capital improvements program, as well as on-going operational programs. Haas describes routine testing and periodic water main flushing to improve water quality, sequestering agents to reduce the effects of naturally occurring minerals in groundwater, and annual cleaning of between 10 and 20 percent of sewer collection mains as examples of ongoing operational programs. However, Haas rarely indicates where these capital improvements or on-going operational programs have been instituted. For example, when specifically asked by a Commissioner what capital

improvements or operational programs have been employed in the Plantation subdivision, Haas was unable to identify such improvements or operations. Tr. 3 at 259.[3]

Further, despite these discussions of capital improvements and on-going operational programs, customers in a number of subdivisions continue to complain about water quality. Mark Kendrick of the Ridgewood Farms subdivision was one such customer. Tr. 1 at 27. Mark Jennings of the same subdivision stated that his water turns black three to four times a year. Id. at 32. Linda Hogan Fick of the Shandon subdivision complained of water quality that was "terrible" and that the water contained excessive amounts of chlorine. Id. at 38. Essmaeil Maghsood of the Plantation subdivision testified that he was forced to wash his clothes at his business, which is served by another water provider, due to the poor quality of the water serving his home. Id. at 53. Bill Bracken, also of the Plantation subdivision, complained about water quality and stated that he had to use water softeners and filters. Id. at 77. Mike Loftis of the Bridgewater subdivision in Anderson County also complained about the quality of the water and stated that his water had a "chlorine" smell. Further, his water pressure was low. Tr. 2 at 61. Although we do not base our denial of this Application solely on water quality concerns, the complaints of the stated individuals do raise questions as to where the capital improvements and on-going operational programs testified to by the Company witness were implemented, and whether they were effective. This Commission simply cannot tell where the improvements and operational programs made by the Company were instituted by examining the Company testimony.

[3] Plantation subdivision is located in York County, South Carolina.

USSC's Application states as part of its "Need and Justification for Rate Relief" that the proposed rate increase would "promote continued investment in and maintenance of its facilities, and thereby permit Applicant to continue providing reliable and high quality water and sewer services." USSC Application at 4. As seen from the testimony quoted above, it is questionable whether the Company has provided high quality water service in many cases, even after receiving the rate increase awarded in Order No. 2006-22. For example, Mark Jennings, a customer in the Ridgewood Farms Subdivision, stated he had not seen any increase in service or quality since the last rate increase. Tr. 1 at 33-34.

This Commission sits like a jury of experts. Hilton Head Plantation Utilities , Inc. v. The Public Service Commission of South Carolina, supra ("Hilton Head"). We are simply not able, as a jury in this case, to find that USSC made all of the capital improvements alleged, nor that it performed all of the on-going operational programs that it alleges for ratemaking purposes. The Company states that it made the capital improvements and performed the operations, but the testimony of the public witnesses taken as a whole calls the Company testimony into question, especially given the lack of system-specific testimony by the Company. Without more specificity on the part of the Company, we are unable to credit the Company with the capital improvements and on-going operational programs that it purports to have made.

B. AFFILIATE TRANSACTIONS

The Company also failed to prove that certain payments to an affiliate for sludge hauling services were reasonable. The Company was not able to provide comparable quotes for sludge hauling from other entities that could be compared with USSC affiliate

Bio-Tech's sludge hauling costs. See Testimony of Company witness Georgiev, Tr. 3 at 184. Although the Company witness stated that she "thought someone in the Company had performed such a study," she, as the accounting witness for the Company, had no information in this area. Without price comparison data, the Commission has no way to determine whether the Company's affiliate Bio-Tech was providing the sludge hauling service at a fair price. The Company's burden of proof regarding affiliate transactions has been addressed by the Supreme Court in the Hilton Head case.

In Hilton Head, the Commission denied a rate increase to a Company which had failed to provide sufficient information with regard to comparative costs regarding the costs of certain affiliate transactions. In that case, the Utility argued that all amounts paid were reasonable simply because they were paid. The Supreme Court held that the burden of proof of the reasonableness of expenses incurred, in the context of a rate case, rests with the Utility. Further, the Supreme Court stated that when payments are made to an affiliate company, a mere showing of actual payment does not establish a *prima facie* case of reasonableness. In addition, the Supreme Court noted that charges arising out of intercompany relationships between affiliated companies should be scrutinized with care, and if there is an absence of data and information from which the reasonableness and propriety of the services rendered and the reasonable cost of rendering such services can be ascertained by the Commission, allowance is properly refused.

Accordingly, in this case, the Bio-Tech costs included in the Company's case must be denied because the Commission was unable to properly scrutinize the propriety of the Bio-Tech costs due to a lack of comparative data.

C. DHEC VIOLATIONS

Neither Company witness Haas, nor any other Company or ORS witness, addressed the fact that the Shandon water system in the Rock Hill area of York County had exceeded the lead "action level" for the monitoring period of June through September 2006. Linda Hogan Fick, a customer, actually presented a letter from the Company, dated December 8, 2006, addressing this issue. Tr. Vol. 1 at 38-39. Hearing Exhibit 1.

Although Haas' conditional direct testimony addressed other concerns raised by Ms. Fick, it failed to address the lead violation raised by her exhibit. Further, Haas' rebuttal testimony dealt at some length with DHEC violations; however, he again failed to address DHEC's notice of the Shandon water system's exceedance of the lead action level for the above-referenced monitoring period, which is a period within the test year.

The failure of either the Company (or the Office of Regulatory Staff) to address this matter makes us question what other DHEC violations might have occurred with the USSC systems that were not brought to the attention of the Commission. Commission Regulations 26 S.C. Code Ann. Regs. 103-514.C and 103-714.C require wastewater and water utilities, respectively, to provide notice to the Commission of any violation of PSC or DHEC rules which affect the service provided to its customers. Such notice must be filed within 24 hours of the time of the inception of the violation and must detail the steps to be taken to correct the violation, if the violation is not corrected at the time of occurrence. Under the further terms of the Regulation, the Company must notify the Commission and the Office of Regulatory Staff in writing within 14 days after the violation has been corrected.

No notice was provided to this Commission with regard to the "action level" for lead having been exceeded in the Shandon neighborhood in York County. This Commission believes that this violation should have surely been reported. Once Ms. Fick raised the specter of a DHEC lead violation, the Company should have furnished responsive information. This glaring omission raises the question as to what additional DHEC violations might have gone unreported from the Company's systems. This is a matter of major concern for the safety and welfare of the Company's customers. Again, the Company failed to furnish necessary information and failed to meet its burden of proof.

D. ANDERSON AND DISTRIBUTION-ONLY CUSTOMER RATES

The testimony of a number of the Company's customers from Anderson County is troubling to this Commission. The gravamen of the testimony is that a number of USSC customers are paying significantly more than their neighbors who are on various nearby municipal water systems.

Customers testifying on this topic were numerous, both at the evening public hearing in Anderson and at the public portion of the hearing at the Commission's offices. Ms. Melanie Wilson of the Lakewood subdivision testified in Anderson that USSC customers in that subdivision already pay 142% more than their neighbors in the Green Hill subdivision, who are customers of Hammond Water District. Implementation of the revenue increases in the proposed orders submitted to us by the Office of Regulatory Staff and the Company would result in Lakewood residents paying an estimated 182% more than Green Hill residents, based on the Hammond usage rate of $2.34 per 1,000

gallons. Other testimony on striking differences between USSC distribution-only rates and rates charged by other systems in proximate areas was provided by Mike Walsh, Tr. 2 at 53, Richard Gibson, Id. at 22-26, and John Broom, Id. at 38-41 (with all three also being residents of Lakewood Subdivision); William Cooke, Id. at 30 (resident of Green Forest served by USSC, with the other system in close proximity being owned by the West Anderson municipal system); Scott Johnson, Id. at 38-40 (resident of Hidden Lakes Subdivision, with West Anderson as the nearby provider); Anthony Thompson, Id. at 60-62 (resident of Bellemeade Subdivision); Johnny Fuller, Id. at 64; Larry Chatham, Id. at 79-82 (resident of Clearview Subdivision, with West Anderson being the municipal provider in close proximity); and Claire Hicks, Id. at 83-85 (lives in Town Creek Acres, with the Hammond system being in close proximity).

Also, certain customers in York County presented similar testimony. Brent Morehead, Tr. 1 at 19 (resident of Silver Lakes, with a complaint that York County rates are less); and Essmaeil Maghsood, Id. at 53-61, Hearing Exhibit 2 (resident of Plantation subdivision, with a complaint that Rock Hill water is less expensive).

This testimony raises questions of fairness with regard to the price paid by the distribution-only customers of the Company, again, noting that the Company does propose an increase in the distribution-only rates in this case. We have searched the record, but have been unable to find any evidence supporting an increase in this particular rate, other than the general Company testimony on revenues and expenses. Further data on the Company's cost of providing water to the distribution-only customers should have been provided, especially given the apparent disparity between the rates presently charged by the Company to its distribution-only customers, as compared to the rates

charged by the various adjoining municipal systems. Again, the Company has simply failed to meet its burden of proof.

This Commission understands that the Company has no control over the rates that it must pass through from, for example, the various municipal systems serving Anderson County to its distribution-only customers. It may be the case that the neighboring water system is providing distribution services to its customers at a deep discount. Haas pointed to the fact that the Hammond Water Service District does not extend a discount to USSC for its bulk purchases of water. Tr. 3 at 219. However, these factors alone, without further explanation, do not explain the gross disparities in water rates between USSC and its neighboring systems. If the difference in rates is justifiable, the customers deserve to know why. Many of the Company's customers questioned these disparities, and without some factual explanation of why they exist, this Commission is unwilling to further exacerbate them.

IV. GENERAL DISCUSSION

As stated supra, S.C. Code Ann. Section 58-5-210 (1976) notes that the Public Service Commission is vested with the power and jurisdiction to supervise and regulate the rates and service of every public utility in this State, together with the power, after hearing, to ascertain and fix such just and reasonable standards, classifications, regulations, practices and measurements of service. Further, it is incumbent upon the Commission to approve rates which are just and reasonable, not only producing revenues and an operating margin within a reasonable range, but which also distribute fairly the revenue requirements, considering the price at which the company's service is rendered

and the quality of that service. Seabrook Island Property Owners Association v. South Carolina Public Service Commission, et al, supra.

The failure of the Company to meet its burden of proof in this case makes it impossible for this Commission to determine whether or not the proposed rates of the Company are just and reasonable. We cannot tell whether the proposed "price at which the company's service is rendered" is reasonable. The Company claimed capital expenditures and system improvements, but in large part, did not identify the systems where these expenditures and improvements occurred. Accordingly, we could not identify whether the expenditures were appropriate and whether these justified the imposition of a rate increase on the Company's customers.

The information provided by the Company is insufficient to allow us to make any determination as to the appropriateness of the proposed rates and charges. Accordingly, the proposed rates are unjust and unreasonable, and the application must be denied and dismissed. The Company's rate of return on equity will remain at 9.75%, the rate of return on rate base will remain at 8.37%, and the Company's operating margin will remain at 11.29%. See Order 2006-22. Accordingly, we make the following

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Utilities Services of South Carolina, Inc. is a water and wastewater utility supplying water supply and distribution services to 6,854 residential and commercial customers, and providing wastewater collection and treatment services to 376 residential and commercial customers.

2. USSC provides its services to portions of Abbeville, Anderson, Lexington, Richland, Saluda, and York Counties.

3. Order No. 2006-22, dated January 19, 2006, approved a revenue increase for the Company of $614,708. USSC now seeks approval of additional revenues of $772,965, as per the proposed Orders of the Company and the ORS.

4. The Commission heard testimony from members of the public at two evening public hearings in York and Anderson Counties and at the hearing held at the Commission's offices.

5. The Commission heard testimony from witnesses for the Company and for the Office of Regulatory Staff at the December 13, 2007, hearing at the Commission's offices.

6. In considering the Company's Application, the Commission must consider two competing interests. The first interest is that of the customers of the system in receiving quality service and a quality product at a fair rate. The second interest is that of the Company to have the opportunity to earn a fair rate of return. Balancing those interests in the present case, this Commission believes that the interests of the customers of the system in receiving quality service and a quality product at a fair rate have been addressed by the public witnesses, while the Company has failed to adequately present a case for a change in the level of revenues approved in Order No. 2006-22.

7. The Company has failed to meet its burden of proof in several respects and has failed to justify rate relief at this time.

8. The Company has failed to identify the location of alleged capital expenditures or how the expenditures improved service.

9. The Company has failed to provide required comparable information with regard to affiliate transactions with its affiliate Bio-Tech.

10. The Company has failed to provide evidence on a violation of DHEC standards.

11. The Company has failed to show why a rate increase to the distribution-only customers in Anderson County, or in the rest of the Company's service area, would be just and reasonable.

12. The objections of USSC to the Commission receiving and relying on customer testimony, documents, and related exhibits are overruled, except for the objection to public hearing witness Snavely's ability to be denominated as a party to the case. This portion of the objection is sustained.

13. The Company has failed to meet its burden of proof in the areas of capital improvements, affiliate transactions, DHEC violations, and the level of rates for distribution-only customers.

14. The Commission's jurisdiction over this case is derived from S.C. Code Ann. Section 58-5-210 (1976), which states that the Public Service Commission is vested with the power and jurisdiction to supervise and regulate the rates and service of every public utility in this State.

15. The Seabrook Island Property Owners Association case requires this Commission to approve rates which are just and reasonable, not only producing revenues and an operating margin within a reasonable range, but which also distribute fairly the revenue requirements, considering the price at which the company's service is rendered and the quality of that service.

16. The failure of the Company to meet its burden of proof in this case makes it impossible for this Commission to determine whether or not the proposed rates of the Company are just and reasonable.

17. The Commission cannot tell whether the proposed "price at which the Company's service is rendered" is reasonable.

18. The Commission could not identify whether the proposed expenditures were appropriate, and whether these justified the imposition of a rate increase on the Company's customers.

19. The information provided by the Company is insufficient to allow the Commission to make any determination as to the appropriateness of the proposed rates and charges.

20. Pursuant to the Finding in No. 19 above, the proposed rates are unjust and unreasonable, and the application must be denied and dismissed.

21. The Company's rate of return on equity will remain at 9.75%, the rate of return on rate base will remain at 8.37%, and the Company's operating margin will remain at 11.29%, pursuant to Order No. 2006-22.

VI. ORDER

IT IS THEREFORE ORDERED:

1. That the Company's Application is denied and dismissed.

2. That this Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

G. O'Neal Hamilton, Chairman

ATTEST:

C. Robert Moseley, Vice-Chairman

(SEAL)

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2007-286-WS - ORDER NO. 2009-353

MAY 29, 2009

IN RE:	Application of Utilities Services of South Carolina, Incorporated for Adjustment of Rates and Charges and Modifications to Certain Term and Conditions for the Provision of Water and Sewer Service	) ORDER DENYING AND) DISMISSING IN PART) PETITION FOR) REHEARING OR) RECONSIDERATION

I. INTRODUCTION

This matter comes before the Public Service Commission of South Carolina ("Commission" or "PSC") on the Petition for Rehearing or Reconsideration ("Petition") of Order No. 2008-96 ("the Order") filed by Utilities Services of South Carolina, Incorporated ("USSC" or "the Company"). For the reasoning stated in the following paragraphs, the Petition is denied and dismissed in part.

The Company's Application indicated that it provides water supply and distribution services to 6,854 residential and commercial customers, and wastewater collection and treatment services to 376 residential and commercial customers. USSC last received a revenue increase of $614,708 pursuant to Order No. 2006-22, dated January 19, 2006. Based on the proposed orders submitted by the parties in the current docket, the Company sought approval of additional revenues of $772,965. We denied the increase request in Order No. 2008-96, dated February 11, 2008. USSC asks us to reconsider this Order.

In its Petition, the Company raises numerous grounds for reconsideration but essentially asserts that all of its expenditures were reasonable because they have been audited by the Office of Regulatory Staff and not challenged by a party of record, and therefore should be recoverable. However, as the South Carolina Supreme Court stated in Hilton Head Plantation Utilities v. Public Service Commission of South Carolina, 312 S.C. 448, 441 S.E. 2d 321 (1994): "In order to reach a conclusion, the Commission had the duty to believe or disbelieve evidence submitted. The Commission sits like a jury of experts." 441 S.E. 2d at 323. In our Order, No. 2008-96, this Commission held that the Company failed to meet its burden of proof in a number of particulars, and we decline to alter our findings except where specifically noted in response to the Company's Petition.

The Company's arguments for reconsideration are addressed below.

II. CAPITAL IMPROVEMENTS AND PLANT INVESTMENTS

The Company contends the Commission erred in concluding that USSC did not meet its burden of proof because the Company's witnesses could not substantiate the claimed capital improvements and plant investments made since its last rate case. See Order at pp. 4, 11-13, and 20-22. The Company argues that it met its burden, in that it presented testimony showing millions of dollars invested in plant additions and capital improvements to both water and sewer systems. Also, the Company asserts that there is independent, corroborative evidence from the state agency charged with the duty of auditing USSC's books and records in this regard, namely, the Office of Regulatory Staff ("ORS"). Further, the Company states that there is no evidence that the Company did not make the capital improvements and plant investments claimed. The Petition of the

Company further complains, *inter alia,* that the Order improperly relies upon testimony of only six water customers in only four subdivisions with water service complaining about water service or quality to reach this conclusion. USSC Petition at 2.

The general rule in administrative proceedings is that an applicant for relief, benefits, or a privilege has the burden of proof. Leventis v. South Carolina Department of Health and Environmental Control, 340 S.C. 118, 530 S.E. 2d 643 (2000). As we held in a number of particulars in Order No. 2008-96, USSC failed to meet that burden. After consideration of the evidence, denial of relief is justified because a number of matters were either left unaddressed or were inadequately addressed by the Company, which left no choice but to reject the requested rate increase.

With further regard to the capital improvements issue, the Company states that "the reliance upon the cited customer testimony and testimony of Company witness Haas to deny USSC the benefit of its plant investments made since its last rate case is not substantial evidence." USSC Petition at 3. According to the Company, the most the Commission can conclude from the cited customer testimony is that no capital improvements were made in those individual customers' subdivisions, leaving no grounds to deny recognition in rate base of capital improvements that were made in other subdivisions.

As stated in Order No. 2008-96, the Company's Regional Director, Bruce Haas' testimony was vague as to which capital improvements have been made. Even in response to specific questions, Haas was rarely able to indicate where the capital improvements were made or where on-going operational programs were instituted.

Customer testimony cited raised additional doubt as to where capital improvements were made. Haas testified generally that the company had made "over $5 million worth of plant additions since October 2002, and over $3 million worth of plant additions since the company's last rate case". Tr. Vol. 3 p. 227:8-11. He added that "some of the improvements do not result in benefits that are visible to customers in every subdivision". Tr. Vol. 3 p. 227:12-16. However, when asked for details, he largely failed to provide understandable testimony regarding the location and type of improvements made by the Company. For instance, when asked about whether any of the Company's expenditures had been spent to address the specific water quality issues raised by the public witnesses, Mr. Haas responded with an answer that appeared to instead address Company-wide expenditures:

> Yes. The main part of the question would be, what have we done, because **you have a lot of chemical feed equipment that we would have installed initially as part of this $5 million worth of capital improvements**. You have chemical feed that would address things such as possible iron, manganese in the water, mineral amount in the water. Some things that also go along with that would include setting up flushing procedures, implementing a flushing program out in **the systems**. And to have a flushing program, you also have to have ways to isolate different mains so that you can flush them properly. You also have to – in order to isolate the mains you also have to have adequate valves in place. So that continues – **we've done that in a number of places** --.

Tr. Vol. 3 p. 256:3 to 256:15 (emphasis added).

Again trying to elicit an answer specific to the systems complained of by the public witnesses, Haas was then asked: "Have you done it in Foxwood?", to which he replied:

> Foxwood, we have installed blow-offs and the flushing – the actual flushing program out there. We also have – I think one of the discolored-

> water complaints – you said soot, and I'm not sure I saw soot anywhere, but we'll get complaints of possible cloudy water. Cloudy water doesn't necessarily mean it's discolored. It could have air in the water, air coming from the well. And you can have that type of discoloration or cloudy looking water that you put water in the glass and it looks cloudy, but after it sits for a bit the air bubbles disappear, kind of like Perrier water, except we don't charge for the Perrier.

Tr. Vol. 3 p. 256:16 to 257:2. Therefore, with regard to Foxwood, the only capital improvement Haas could recall was the installation of blow-off valves. The rest of his extensive answer dealt with non-capital improvements. He provided no details, costs, or other information.

He was then asked about specific improvements in the Plantation subdivision, another location in which public witnesses have complained of a lack of system improvements. Haas stated: "**Yes. I can't tell you what, in Plantation, specifically that would come to mind.** I know on nearly every single facility that we had, since we took over, we have done some type of upgrades at the facilities, whether it be installed new well houses, the hydrotanks, new piping, chemical feed." Tr. Vol. 3 p. 257:14-18 (emphasis added). Again, he provided no details, costs, or other information.

Similarly, in regard to future planned improvements, USSC's own application states that its proposed rate increase would "promote continued investment in and maintenance of its facilities." Application at 4. However, when Hass was pressed for details about planned improvements, he was again unable to provide further detail. See Tr. Vol. 3 p. 251:12 to 252:22.

When specifically asked if the Company was "planning any infrastructure improvement in any of these areas", Mr. Haas appeared to avoid the question, stating:

> Well, many things, such as that customers – that you commented – that they don't see a system, or they don't see what improvements are being made. A lot of things may occur at, say, a particular well house. Or if you replaced a section of main, that main is underground so you don't see that, so it's not something that is aboveground and readily seen, that would, I guess, put a different light on what we're out there doing. If they're not at the particular well house – let's say we replace a well pump. Let's say we upgrade a well house and replace a hydrant tank, that's not --.

Tr. Vol. 3 p. 251:12 to 251:25.

Asked again "And are you planning to do any of these things specifically for these neighborhoods? Do you have any plans on the books?", Hass could only say:

> We have a capital improvement program. I can't say for each one of the systems – where they have complained about the hydrants, we don't have any plans for that. That would be not cost justified. Any other types of improvements that we've currently got going on, such as we have installed additional valves within a water system or additional flushing – what we call blowoffs – to be able to flush the system better .... Things like that are currently going on and I think in many of the projects that we've had over the last couple of years, that was some of the list of projects that we've actually undertaken. So we've continued to do that. We've replaced hydropneumatic tanks. We continue working on improving our processes... .

Tr. Vol. 3 p. 252:1-17. USSC simply failed to provide understandable testimony regarding the location and type of improvements made or planned by the Company. We believe this is inadequate, especially given the magnitude of the requested increase. We agree with the customers – who were facing the second substantial rate increase in as many years – that they deserve to know what capital improvements have and will be made to the facilities that serve them. Therefore, the Commission rejected USSC's application because the Company was unable to describe its claimed capital improvements in any kind of intelligible detail, thus failing in its burden of proof.

a. Customer testimony.

The Company alleges that because a "de minimis" number of customers presented testimony on the issue of capital improvements, the Commission should have accepted the Company's testimony on the issue. This is not a valid argument in light of the established case law in South Carolina. The case of Hilton Head Plantation Utilities stands for the proposition that the Commission may withhold or deny approval of proposed rates, based on the testimony of **one** witness, if that witness has raised legitimate questions about the propriety of those rates due to suspect expenses. In Hilton Head Plantation Utilities, a customer raised a question concerning the utility's expense monies paid to its affiliates. The Commission wrote that the entire amount of the utility's expenses was called into question because of questionable amounts paid by the utility company to affiliates, and, again, this was brought to the Commission's attention by one individual. The Commission's action was upheld by the South Carolina Supreme Court. In the present case, the Commission considered the testimony of multiple USSC customers who complained that the quality of their water and service had not improved since the Company's last rate increase. Order at 12.

Many of the Company's Anderson area customers complained of a lack of capital improvements by the Company in their particular neighborhoods. Some eighty-six people attended the public hearing in Anderson. Thirty people testified, and fourteen[1]

[1] Melanie Wilson, Tr. Vol. 2 at 17-25; William Cooke, Id. at 30-32; Scott Johnson, Id. at 39-46; James Bredenkamp, Id. at 46-47; David Loudin, Id. at 47-50; Lee Leary, Id. at 50-52; Mike Walsh, Id. at 55-56; Darrel Rogers, Id. at 56-60; Jeremy Crowe, Id. at 60-61; Mike Loftis, Id. at 64-65; Peter Kratz, Id. at 76-83; Larry Chatham, Id. at 83-87; Ken Cheek, Id. at 91-92; and Lou Rotola, Id. at 93.

complained that in spite of substantial rate increases, no improvements had been made to their system. Four other witnesses[2] generally expressed agreement with the testimony of Melanie Wilson, who, as set out more fully at p. 23 and below, specifically addressed this same concern. No one testified in favor of the rate increases proposed in this case, nor did anyone testify as to positive capital improvements made in their neighborhoods.

For instance, public witness Wilson stated during the public hearing conducted in Anderson that she had never seen any maintenance on any of the individual pipes in her Lakewood subdivision. Tr. Vol. 2 p. 24:22-25 to 25:1. Public witness William Cooke complained of failing pipes and failing meters in the Green Forest neighborhood. Id. p. 31:4-25 to 32:1-4. Witness James Bredenkamp complained of no major maintenance to the system in the Town Creek area. Id. p. 46:21-25 to 47:1. Witness Larry Chatham complained of 30 year old lines and failure to replace those lines in the Clearview neighborhood. Id. p. 84:23-25 to 85:1-12. Witness Lou Rotola, a 34 year resident of the Town Creek Acres community, noted that no new improvements have been made to the water system in his neighborhood. Id. p. 95:14-23. Notwithstanding the Company's view that concerns expressed by their customers were "*de minimis*", we find that this testimony, by various residents of a number of subdivisions served by the Company, more than meets the Hilton Head Plantation Utilities standard for consideration of customer testimony. Further, the testimony of these customers, combined with Haas' inability to describe the specific cost and location of the claimed improvements, led the Commission to question the prudence of the Company's expenditures. This combination

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[2] Ginger Kirby, Tr. Vol. 2 at 61-62; Johnny Fuller, Id. at 65-68; Robert Oppermann, Id. at 72-74; and Bill Konen, Id. at 90-91.

of the testimony regarding the lack of capital improvements given by customers, along with the inadequacy of the Company's witness' testimony on the issue, is at the root of the Commission's disagreement with the Company. The Commission believes that these customers deserve, and are entitled to, an explanation; the Company does not.

The Company also alleges that even if customer testimony were relevant to the level of the Company's plant investment and rate base, the Order's statement that "the testimony of the public witnesses taken as a whole calls the Company testimony into question" is in error. The Company maintains that the level of customer testimony is not substantial evidence, and was not sufficient to call the Company testimony into question. This allegation of error is without merit, given the South Carolina Supreme Court's holding in Hilton Head Plantation Utilities as discussed supra.

Further, the Company's citation of the Supreme Court's Memorandum Opinion in Heater Utilities, Inc. v. Public Service Commission of South Carolina, Op. No. 95-MO-365 is inapposite, even ignoring the fact that a memorandum opinion is not precedential, except for cases where it is directly involved. See 239 (c) (2), SCACR. The Company's citation of Porter v. S.C. Public Service Commission, 328 S.C. 222, 493 S.E. 2d 92 (1997) is also misplaced, since that case only discusses a percentage of variance in expenses as not being significant. This is irrelevant to a finding that, due to a combination of customer and Company testimony, the total amount of Company expense was in question.

The Company argues that even assuming the Commission could properly rely upon customer testimony, Order No. 2008-96 erroneously denies USSC's request to

include in rate base additions to sewer plant given no customer raised any issue with respect to sewer service. Again, as previously stated, without more specificity as to location and amount on the part of the Company, we were unable to credit the Company with the capital improvements and on-going operational programs it purports to have made. Order at 13. This fact is true for both the water and sewer areas. Accordingly, we discern no error.

b. Commission Precedents

The Company alleges that Order No. 2008-96 is an arbitrary departure from the Commission's prior precedents involving other water and sewer utilities, because, in past cases, the Commission heard customer complaints about water quality and poor service, but did not deny rate relief. USSC cites 330 Concord Street Neighborhood Association v. Campsen, 309 S.C. 514, 424 S.E.2d 538 (Ct. App., 1992), *inter alia*, as support for its position, then goes on to cite four cases where it believes different results occurred under similar circumstances. The Company argues that the four cited cases are precedential in the present case, and faults the Commission for failure to rule in a manner consistent with those cases.

The Campsen case does stand for the proposition that an administrative agency acts arbitrarily if it fails to follow its own precedents without justification. However, Campsen also holds that when there are distinguishing factors between cases, the agency may arrive at a different conclusion. 424 S.E. 2d at 540. Nor does Campsen prohibit the Commission from departing from previously established regulatory policies if it has a rational basis for doing so. As discussed below, Campsen does not prohibit our

conclusions in the present case. As explained herein, USSC fails to recognize the distinguishing factors between the present case and the cases cited.

The Company cites to a prior USSC rate case, in which the Commission heard testimony from customers complaining about water quality.[3] Notwithstanding the complaints the Commission approved a rate increase in Order No. 2006-22, based in part upon additions to the Company's rate base testified to by both Company and ORS witnesses. The Company also cites similar rulings in rate cases brought by Southland Utilities[4] and Tega Cay Water Service.[5] Although customer testimony was presented in both cases, no Company or customer testimony raised a question as to whether capital improvements were made. USSC also cites the Commission's order granting a rate increase to Carolina Water Service.[6] The Carolina Water Service case is also distinguishable from the case at bar. In that case, witness Haas gave specific testimony as to location and cost on a portion of the capital improvements by discussing installation of a new odor control baffle and air scrubber system at the Company's Watergate plant, at a cost exceeding $135, 000. See Docket No. 2004-357-W/S, Tr. Vol. 5 p. 325.

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[3] Application of Utilities Services of South Carolina, Incorporated for Adjustment of Rates and Charges and Modifications to Certain Terms and Conditions for the Provision of Water and Sewer Service, Docket No. 2005-217-WS.

[4] Application of Southland Utilities, Incorporated for Adjustment of Rates and Charges for the Provision of Water Service, Docket No. 2007-244-W and Order No. 2007-887.

[5] Application of Tega Cay Water Service, Inc. for Adjustment of Rates and Charges and Modifications to Certain Terms and Conditions for the Provision of Water and Sewer Service, Docket No. 2006-97-WS and Order No. 2006-582.

[6] Application of Carolina Water Service, Incorporated for Adjustment of Rates and Charges and Modification of Certain Terms and Conditions for the Provision of Water and Sewer Service, 2004-357-WS and Order No. 2005-328.

In any event, the Commission may find testimony more persuasive in one case than another. The Company's argument is essentially that once the Commission has granted a rate increase in spite of customer complaints, it must do the same in subsequent cases. This argument misconstrues Campsen, as well as the Commission's prior decisions. The flaw in the Company's argument is that it ignores the fact finding role of the Commission. In the case at bar, the Commission heard from eighteen customers[7] who voiced or supported concerns about the fact that USSC had requested a substantial rate increase for the second time in two years and that they had seen no improvement in service or facilities. The Commission believes these customers deserve an answer to their concerns, and regrettably it is unable to give them one.

c. Court of Common Pleas Precedents.

USSC states that the Commission's Order is erroneous as a matter of law because it ignores certain Orders of the Court of Common Pleas for Richland County related to previous cases involving other utilities, specifically Tega Cay Water Service and Carolina Water Service. According to the Company, we improperly relied upon "unsubstantiated" customer testimony regarding service quality issues as a basis to deny rate relief or to impose requirements upon the utility exceeding Commission authority to do so. However, this Commission did not rely upon the customer testimony regarding service quality issues alone as a basis to deny rate relief or to impose unauthorized requirements on the utility. To the contrary, we examined the customer testimony and concluded that

[7] See footnotes 1 and 2.

that testimony called into question, to some degree, the Company testimony with regard to where capital improvements had been made.

Our conclusion was that, even though Company witness Haas generally testified that the capital improvements were made, in the absence of specifics from Haas or any other Company or ORS witnesses and with the quality of service problems experienced by a number of the Company's customers, we could not discern the location of many of the capital improvements. Even as to those for which we could discern the locations, we could not discern the associated capital costs. No list of capital improvements was provided by the Company. The Commission cannot determine the prudence of the capital expenditures without knowing the location and type, and mere expenditure does not prove prudence. Therefore, customer testimony on quality of service was not directly employed to deny rate relief, but only to raise questions as to where capital improvements were made. Accordingly the Company's basic premise for this exception is faulty, and the exception must be rejected.

Furthermore, the Circuit Court Orders cited in support of the Company's position are not rulings related to the present USSC rate case. In proposing these cases as precedent, the Company ignores Rule 239(d)(2), SCACR, which states that unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved. Even so, we thoroughly explained our views on the Tega Cay Water Service case at pages 8-10 of Order No. 2008-96, and we affirm those views and include them here by reference as if repeated verbatim. Further, even if the Carolina

Water Service case precedent was applicable here, it is unpersuasive in view of the circumstances in the present case. We reject this allegation of error in its entirety.

d. Patton v. Public Service Commission.

The Company alleges that Order No. 2008-96 is arbitrary and capricious, constitutes an abuse of discretion, and is erroneous as a matter of law because it withholds all rate relief in all of the eighty-two subdivisions receiving water and the four subdivisions receiving sewer service from USSC. The Company cites Patton v. Public Service Commission, 280 S.C. 288, 312 S.E. 2d 257 (1984) for the proposition that, if rate relief is delayed, it should be delayed only in the subdivision, or subdivisions, where the problems existed. USSC, however, again ignores the fact that it failed to meet its overall burden of proof for the entire rate case, which encompassed all subdivisions in the Company's territory. Further, even if Patton's standard of delaying rate relief only in "subdivisions where the problems existed" was applicable, the Company's failure to provide proof regarding the location of expenditures is a systemic one, therefore applicable to all of their subdivisions.

In addition, our decision in Order No. 2008-96 was not exclusively based on the Company's general failure to show where capital improvements were made, but also on its failure to properly document whether affiliate expenses for sludge hauling by Bio-Tech were appropriate. These questions go to the appropriateness of expenses which were allocated to all eighty-two subdivisions in the Company's system, not just one subdivision. Therefore, under the circumstances, we appropriately denied rate relief to the Company over the entire system, and Patton simply does not apply. Further, no

showing of "special circumstances" to separate out specific subdivisions as required by August Kohn and Co. v. Public Service Commission and Carolina Water Service, 281 S.C. 28, 313 S.E. 2d 630 (1984) was made, as is further discussed below.

e. August Kohn decision.

In its Petition, USSC argues that Order No. 2008-96 is arbitrary and capricious, constitutes an abuse of discretion, and is erroneous as a matter of law because it is contrary to the holding of the Supreme Court of South Carolina in August Kohn and Co., Inc. v. Public Service Commission and Carolina Water Service, supra.[8] The Company argues that the Supreme Court held in August Kohn that rates for a public utility are properly set on a statewide basis, and a specific subdivision may have its rates set separately only where special facts and circumstances exist. USSC states that if such special facts or circumstances exist in the present case, the proper means to address them is to exclude only those subdivisions from a rate increase where special facts and circumstances exist. Instead, the Commission withheld all rate relief in all of the eighty-two subdivisions receiving water and the four subdivisions receiving sewer. The Commission rejects the Company's argument for several reasons.

The Commission acted properly even if the Company's interpretation of the holding in August Kohn is accepted. Certainly, if rates are properly set for a utility on a statewide basis, the Commission's holding was both uniform and consistent with this case law when it rejected a rate increase for all the Company's systems located

[8] USSC's Petition has separate sections for its arguments concerning the application of the Patton and August Kohn cases; therefore we have dealt with them separately here. However, we find little distinction between USSC's application of the two cases.

throughout the State. By USSC's own reasoning, since no special facts and/or circumstances were found by this Commission in Order 2008-96 as required by August Kohn for individual subdivision rate treatment, the Application was correctly rejected in its entirety. The Company simply failed to explicitly present evidence about where capital improvements were made that would allow a finding of special circumstances, resulting in individual rate treatment for specific subdivisions. Similarly, we reiterate the non-applicability of the Patton case since the Company's overall failure of proof leads us to the inability to deny relief in only certain subdivisions. Again, we conclude that an overall denial of rate relief was in order, and, indeed, was properly ordered in Order No. 2008-96.

f. ORS's audit and investigation.

In addition, the Company argues that the Commission's Order is erroneous as a matter of law because it ignores the investigation, audit, examination, and testimony of the Office of Regulatory Staff (ORS), which concluded that USSC had made the additions to plant proposed to be included in the Company's rate base in the parties' proposed orders. The ORS materials discuss total dollar amounts of capital improvements, but fail to set out the specific items or even the locations of the capital improvements made by the Company. The Commission is not aware of whether such information was available to the ORS. USSC cites Johnson v. Painter, 279 S.C. 390, 307 S.E. 2d 860 (1983) as supporting authority. The only statement in that case that seems relevant is as follows: "The Court does not always have to accept uncontradicted evidence as establishing the truth; however, it should be accepted unless there is reason

for disbelief." In the present case, there is clearly reason for disbelief as to whether any expenditures made were prudent. As stated above, the Commission cannot determine the prudence of the capital expenditures without knowing the location and type, and mere expenditure does not prove prudence. The customer testimony cited in Order No. 2008-96 at 12 supports our point that this Commission simply cannot tell the prudence of the expenditures because it cannot determine where the improvements and operational programs were made by the Company. Accordingly, there is "reason for disbelief" as stated in the Johnson case, and this allegation of error is without merit.

III. OPERATING EXPENSES

The Company contends error in the Commission Order finding that the Company failed to meet its burden of proof with respect to increases in operational expenses claimed to have been incurred since the Company's last rate case. The Company argues that the Commission, at least implicitly, denied the Company's operating expenses. The Commission acknowledges that certain portions of the items referenced as capital expenditures were actually operating expenses. However, the allegations of error are almost identical to those alleged against the Commission's findings regarding capital improvements. Accordingly, we reiterate our prior holdings as to the Company's failure to meet its burden of proof with regard to capital improvements.

USSC further appears to assert that Order No. 2008-96 improperly denies USSC an opportunity to charge for its increased expenses of doing business. USSC Petition at 9. As support for this statement, the Company cites Hamm v. PSC, 310 S.C. 13, 425 S.E. 2d 28 (1993) *citing* Southern Bell v. PSC, 270 S.C. 590, 244 S.E. 2d 278 (1978). This case

is distinguishable factually from the present case because it concerned mandated gas "take or pay" expenses from the Federal Energy Regulatory Commission passable to gas consumers under the federal filed rate doctrine. Further, no question in that case concerned expenditures of the monies involved. Again, in the present case, we held and still hold that the Company failed to prove where it expended the monies asserted and the individual amounts. This omission made a determination of the prudence of the operational expenditures impossible.

In addition, USSC alleges that Order No. 2008-96 erroneously concludes that USSC did not meet its burden of proof with respect to expenditures for operational programs because the Company's expenses are presumed reasonable and incurred in good faith as a matter of law and no party in the case raised the specter of imprudence. According to USSC, the Order is contrary to the holding of the Supreme Court in Hamm v. S.C. Public Service Commission, 309 S.C. 282, 422 S.E. 2d 110 (1992). The case states that the presumption that a utility's expenses which enter into a rate increase request are reasonable and incurred in good faith does not shift the burden of persuasion but shifts the burden of production onto the Public Service Commission or other contesting party, such as the Consumer Advocate, to demonstrate a tenable basis for raising the specter of imprudence. The Hamm case is of questionable application, considering the Supreme Court's opinion in Hilton Head Plantation Utilities. In Hilton Head Plantation Utilities a non-party public witness called into question the prudency of claimed expenses, at least with regard to expenses incurred through affiliate transactions. Thus, the fact that no party raised the issue of imprudence in the present case is not

significant. Further, however, even if the Hamm case is deemed applicable, it must be pointed out that, before the discussion of the presumption of reasonableness of the utility's expenses, the case states: "Although the burden of proof of the reasonableness of all costs incurred which enter into a rate increase request rests with the utility..." 422 S.E. 2d at 286. Therefore, the Hamm case is premised on the burden of proof resting with the utility, a position taken by this Commission throughout this case. This Commission has demonstrated several instances where the Company has not met this burden.

The Commission sits as the trier of fact, akin to a jury of experts. Southern Bell Tel. & Tel. Co. v. Public Service Commission, 270 S.C. 590, 244 S.E. 2d 278 (1978). Simply because testimony is uncontradicted does not render it undisputable. The question of the inherent probability of the testimony and the credibility of the witness remains. Even when evidence is not contradicted, the jury may believe all, some, or none of the testimony and the matter is properly left to the jury to decide. Hoard v. Roper Hospital, Inc., 377 S.C. 503, 661 S.E. 2d 113 (2008). Given the lack of detail as to both capital improvements and expenses in either the Company's or ORS' testimony, and the customer testimony, the Commission was free to conclude that neither Company witness Haas, nor ORS witnesses, properly established the expenditures for operational programs.

IV. BIO-TECH EXPENSES

USSC asserts in its Petition that Order No. 2008-96 erroneously concludes the Company failed to meet its burden of proof with respect to expenses incurred with its affiliate Bio-Tech, Inc. for sludge hauling services. The Company disputes the portion of

the Order that states that there is an "absence of data or information from which the reasonableness and propriety of the services rendered and the reasonable cost of rendering such service can be ascertained." Order at 14. The Company alleges that it provided evidence from which the reasonableness and propriety of this expense can be ascertained in the form of the testimony of the witness Lena Georgiev, Senior Regulatory Accountant for USSC. She stated in testimony that the rates charged by USSC to Bio-Tech were the same as those charged by Bio-Tech to other public utilities and governmental utilities for the same services and were market rates. Tr. Vol. 3 p. 184. USSC submits that this testimony is information from which the reasonableness and propriety of this expense can be ascertained, which is all USSC is required to produce under Hilton Head Plantation Utilities. The Company misconstrues the Commission's findings.

A mere showing of actual payment does not establish a prima facie case of reasonableness when payments are made to an affiliate. Hilton Head Plantation Utilities, 441 S.E. 2d at 450-451. In the present case, the Company stated the reasonableness and propriety of the expenses can be ascertained because the amount USSC paid to Bio-Tech for sludge hauling was the same as paid by other utilities and agencies, and **the amounts paid were market rates**. (emphasis added). See testimony of Lena Georgiev, Tr. Vol. 3 p. 170. However, the only evidence before the Commission to prove this point is the testimony of Ms. Georgiev, indicating that Bio-Tech charged market rates for sludge hauling. She did not cite any other similar contracts or other information which would have allowed this Commission to compare Bio-Tech's rate with market rates. When

questioned on this subject, Georgiev stated she "thought someone in the Company had performed such a study," but provided no additional information. Tr. Vol. 3 p. 184. Since this Commission had no actual market data with which to compare the Bio-Tech rate, and given the uncertain testimony regarding whether the Company had actually carried out such a study, it found an "absence of data and information from which the reasonableness and propriety of the services rendered and the reasonable cost of rendering such services can be ascertained by the Commission." See Hilton Head Plantation Utilities, see also Kiawah Property Owners Group v. Public Service Commission, 357 S.C. 232, 593 S.E. 2d 148 (2004), and Seabrook Island Property Owners Association v. Public Service Commission, 303 S.C. 493, 401 S.E. 2d 672 (1991) (holding it is within the Commission's statutorily delegated power to determine the amount of expense that will be charged to the ratepayers). Accordingly, we properly refused allowance of the expenses under the authority of that case law. Departure from prior precedent was also justified by the specific lack of supporting evidence in this case. As we noted in our prior discussion of Campsen, supra, when distinguishing factors exist between cases, a different result reached by the agency is not arbitrary. Ms. Georgiev's testimony, which lacked comparative data, clearly distinguished this case from prior cases. The Company's allegation of error is without merit.

V. DHEC LEAD ISSUE

USSC takes exception to the section of Order No. 2008-96 which rebuked the Company for its failure to address DHEC's notice of excess lead in the Shandon water system. Neither USSC nor the ORS brought this quality of service issue to the attention

of the Commission. Instead, the lead notice was provided by Linda Hogan Fick, one of the Company's customers. (See Hearing Exhibit 2.) This failure prompted questions about other potentially hazardous system difficulties with DHEC implications that might have occurred throughout the USSC systems of which the Commission was not made aware. We cited this omission as another example of the Company's failure to meet its burden of proof. Order at 15-16. USSC failed to provide information on this issue even when it was raised during the proceedings.

The Company alleges that the letter from the Company to customer Fick informing the Commission of this problem is not a notice of violation by USSC issued by DHEC. According to USSC, it is only a notice required by DHEC to be sent to USSC's customers informing them that lead levels in their water exceeded a specified level during the period in question, and no actual violation of DHEC rules occurred. USSC Petition at 11. The Commission acknowledges that there is no evidence of a violation of DHEC regulations and therefore its finding that the Company failed to report a DHEC violation was in error. Having reconsidered the issue on this basis, we need not address the Company's remaining arguments regarding the allegation of DHEC violations.

VI. WATER DISTRIBUTION-ONLY RATE

The Company takes issue with this Commission's findings that USSC failed to meet its burden of proof with respect to the proposed increase in its water distribution rate because (a) certain of USSC's Anderson and York County water customers "are paying significantly more than their neighbors who are on various nearby municipal water systems," (b) this testimony "raise[d] questions of fairness with regard to the price

paid by distribution only customers of the Company," and (c) USSC did not provide "[f]urther data on the Company's cost of providing water to the distribution-only customers [which] should have been provided... given the apparent disparity between the [distribution-only] rates presently charged by the Company...as compared to the rates charged by the various adjoining municipal systems." Order at 16-18.

USSC asserts that the present rates charged for the Company's distribution-only customers were approved by this Commission in the Company's last rate case and that those rates are therefore presumed correct as a matter of law. The Commission does not dispute this assertion, nor do we seek to lower the present rates charged to the customers. Although no party seeks to reduce the present rates, it is reasonable for this Commission to obtain further evidence on the proposed rates from the parties before adopting them as just and reasonable due to the customer testimony on the issue received at evening public hearings in both Anderson and Rock Hill. See testimony and hearing exhibit cited in Order at 16-17. Simply put, the difference between the Company's rates and those of its neighboring water system, both of which supply water from the same source, is so big in this case that it raises questions with the Company's customers and with the Commission. As a matter of basic accountability, these questions deserve an answer.

USSC customer Melanie Wilson described the disparity between the systems as follows:

> If you look at this photo, Lakewood subdivision is on the right and Green Hills subdivision is on the left directly beside Lakewood. In fact, many of the Green Hill homes have property adjoining the residents in Lakewood, and the vertical line shows the property connection. Green Hill residents get their water directly from Hammond Water District, the same water system where we get our water. In fact, the same water line that serves us

> also serves Green Hill, as well as the other neighborhoods visible in this photo. According to the water line map, this water line runs in front of our subdivisions and is actually in the yard of several Lakewood residents....let's compare our situation to Green Hill's. Based on 6,000 gallons of usage, the average water bill for Green Hill subdivision residents would be just over $34 every two months. Lakewood residents would pay more than $82 every two months, which is 142 percent more than Green Hill residents....Utilities Services has [now] proposed a 49 percent increase in our basic fees and water usage fees.[9]
> Tr. Vol. 2 p. 20:24 to 21:16.

USSC Regional Director Hass only addressed the concerns in general terms, stating that governmental entities have advantages over private companies such as the ability to levy property taxes,[10] issue bonds, and that they do not have to pay taxes or profits to their shareholders. He also cited a municipal water authority's ability to charge higher rates to non-residents outside of city boundaries – a condition not applicable to the Lakewood and Green Hill subdivisions, which are served by a public service district, not a municipality. Haas concluded by saying that the Hammond Water District charges USSC a full service rate, thereby driving the company's rates up. Tr. Vol. 3 p. 226. Haas failed to cite to any specific facts to support his explanations.

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[9] Anderson County Council noted a disparity of rates of approximately 141 percent. Tr. Vol. 2 p. 33:12-20. (Resolution from Anderson County Council presented by public witness Michael Cunningham, Deputy County Administrator for Anderson County); See also Order No. 2008-96 at 17-18, which describes the testimony of a number of other witnesses from both Anderson and Rock Hill, who complained of excessive distribution water rates when compared with nearby Water Districts. See, in addition, the testimony of public witness David Loudin who also described a disparity between his USSC water distribution rate and the Hammond Water District rate. Tr. Vol. 2 p. 48:8-15 to 49:3-9.

[10] While Mr. Haas may have been claiming the municipality had the advantage of levying taxes, he cited no specific evidence for that assertion, and we can find no authority to support a claim that this municipal entity has the authority to levy taxes.

The Commission believes that Mrs. Wilson and USSC's customers in the Lakewood subdivision deserve a better explanation. As the Commission noted in its Order, there may be legitimate reasons for this disparity in rates, but the Commission has no way of knowing. Hass's general explanations, which are no more than theories, are of little help.

Further supporting this Commission's position is the testimony of Catherine Adams, who stated that she and her husband own and operate a dental practice which is supplied by the Hammond Water District. She stated that the bill for the last two months for that dental practice, which has water continually in use, was less than the bill for her home, which is supplied by USSC. She noted that no one was usually at her home. Tr. Vol. 2 p. 52:23-25 to 53:1-14. Again, the rate disparity is called into question with no explanation.

USSC cites Re Bozrah Light & P. Co. 34 P.U.R.3d 398, a 1960 Connecticut Public Utilities Commission case, for the proposition that comparisons of the Company's current rates with rates of other utilities are irrelevant and cannot form the basis for a decision in USSC's case. The case states specifically that "rates may not be prescribed on the basis of comparison with rates of other utilities since, in passing upon the reasonableness, the commission must evaluate the needs of each company upon its own merits." Id. Although it is true that each company must be evaluated on its own merits, the use of comparison evidence with other utilities is not prohibited. See Heater of Seabrook, Inc. v. P.S.C., 332 S.C. 20, 503 S.E. 2d 739 (1998), wherein the South Carolina Supreme Court did not prohibit the use of comparison findings in a case

involving a water-wastewater utility. 503 S.E. 2d at 742. In the present case, there was a large body of customer testimony that compared USSC customers' distribution-only rate from USSC with the rates of nearby municipalities. Order at 16-17. Although this testimony was limited to a comparison of the rates, with some percentage differences cited, the testimony was enough to raise questions of fairness with regard to the price paid by the distribution-only customers of the Company, especially in light of the fact that a rate increase to the distribution-only customers was proposed.

A water system, whether operated by a municipality or a private corporation, is a public utility, and both are bound by a rule of reasonableness in regard to rates. Simons v. City Council of Charleston, 181 S.C. 353, 187 S.E. 545 (1936). It is incumbent upon this Commission to approve rates which are just and reasonable, considering, among other factors, the price at which the company's service is rendered and the quality of that service. Seabrook Island Property Owners Association v. South Carolina Public Service Commission, 303 S.C. 493, 401 S.E. 2d 672 (1991). Unfortunately, when all the evidence had been presented in the present case, we were unable to determine whether an increase to the distribution-only customers was fair and reasonable, based on the record before us.

USSC alleges that Order No. 2008-96 is factually erroneous because it states that "[i]t may be the case that the neighboring water system is providing distribution services to its customers at a deep discount." Order at 18. Instead, the Company states the evidence shows the governmental systems described in customer testimony charge USSC the same per thousand gallons bulk water rate that they charge to their own retail

customers. As USSC points out, it pays the same retail rate as Anderson's retail customers. The Commission does not dispute this testimony. In fact, we cited the testimony of Bruce Haas, who stated that Hammond Water Service District does not extend a discount to USSC for its bulk purchases of water. Tr. Vol. 3 p. 219. Order at 18. However, the Anderson system's failure to extend a discount to USSC does not explain the gross disparities in water rates between customers. We stated that "If the difference in rates is justifiable, the customers deserve to know why," and we refused to further exacerbate the disparities by allowing a distribution-only customer rate increase. Order at 18. Even if no discounts are given by neighboring water systems for distribution services to its customers, the fact remains that there is a difference in rates, and the Company failed to provide an explanation after the issue was raised by the customer testimony. Thus, we discern no error.

VII. DUE PROCESS

USSC alleges that "The Order erroneously limits the scope of the due process protections to which USSC is entitled by ruling that USSC had the opportunity to file responses to its customers' testimony and to cross-examine witnesses." Order at 5-6. The Commission's practice of hearing from the public in rate case proceedings is well established and has been recognized by the state Supreme Court.[11] USSC contends that

[11] see e.g., Patton v. South Carolina Public Service Commission, 280 S.C. at 292-293, 312 S.E.2d at 260 ("The record indicates that a substantial amount of testimony was presented to the Commission by the customers of PPR & M as well as testimony presented by the Director of Appalachian--3 District of DHEC concerning complaints about the quality of service rendered by PPR & M to its customers in the Linville Hills Subdivision."); Hamm v. Public Service Commission, 309 S.C. at 302., 422 S.E.2d at 122 ("As to the effect of the proposed price on customers, the PSC found that the increased

its opportunity to file responses to its customers' testimony and to cross-examine public witnesses was insufficient to protect its right to due process. USSC Petition at 15. The Company argues that these procedural rights were inadequate in light of the fact that "USSC's 'complaining' customers were not required to adhere to the obligations of a party in a contested case." Id. "Nor were any of these customers subject to discovery by USSC..." Id. According to USSC, a disparity was created, resulting in a due process violation.

To the contrary, the Commission gave USSC the opportunity to investigate the testimony of all public witnesses and to respond to their testimony in later filings.

The parameters of due process are expounded upon in Leventis v. South Carolina Dept. of Health and Environmental Control:

> Due process is flexible and calls for such procedural protections as the particular situation demands. Ogburn-Matthews v. Loblolly Partners, 332 S.C. 551, 561, 505 S.E.2d 598, 603 (Ct.App.1998) (quoting Stono River Envtl. Protection Ass'n v. South Carolina Dep't of Health and Envtl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 341 (1991)). The requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review. Ogburn-Matthews, 332 S.C. at 562, 505 S.E.2d at 603; see also S.C. Const. art. 1, § 22. To prove the denial of due process in an administrative proceeding, a party must show that it was substantially prejudiced by the administrative process. Ogburn-Matthews, 332 S.C. at 561, 505 S.E.2d at 603 (citing Palmetto Alliance, Inc. v. South Carolina Public Service Comm'n, 282 S.C. 430, 319 S.E.2d 695 (1984)).

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rates were reasonable .... In addition, the PSC noted that it had received only five letters opposing a rate increase."); Hilton Head Plantation Utilities v. Public Service Comm'n, 312 S.C. at 449, 441 S.E.2d at 322 ("Thereafter Richard C. Pilsbury (Pilsbury), President of the Property Owner's Association of Hilton Head Plantation, a protestant representing many consumer rate payers, called the Commission's attention to the fact that a substantial portion of the Utility's budget was paid to its corporate parent.").

340 S.C. at 131-132, 530 S.E.2d at 650. USSC fails to show that it was either substantially prejudiced by the admission of customer testimony or that it was not allowed the opportunity to be heard in a meaningful way. Not only did USSC benefit from representation of counsel while its customers did not, it also enjoyed the ability to cross-examine these witnesses, file responses to their testimony, and prefile written testimony. Tr. Vol. 1 p. 48, 51, 65, 76; Tr. Vol. 2 p. 58, 67, 72; Tr. Vol. 3 p. 14, 45 and 49; USSC Letter dated December 10, 2007; Haas Conditional Direct Testimony, Tr. Vol. 3 p. 215.

USSC has also participated in evening public hearings over many years and is thoroughly familiar with the type of testimony that sometimes appears during the efforts of this Commission to obtain information on quality of service of the Company. Again, USSC was allowed to investigate and respond to customer testimony after the public hearings, and it did so. In contrast, the general ratepayer is much less sophisticated about rate proceedings and formal hearings than the Company. If any disparity existed, it was in favor of USSC.

USSC argues that by the Commission "allowing customers to circumvent the established method of resolving complaints"[12] it exceeded the powers conferred upon the Commission by the South Carolina General Assembly. USSC does not cite to any customer complaint statute or regulation supporting its claim that formal complaints are the exclusive vehicles for airing of customer complaints. Statutory law does provide for the imposition of fines if a water or sewer utility fails to provide "adequate and proper

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12 USSC Petition at 16.

service to its customers." S.C. Code Ann. §58-5-710. Also the law provides: "Individual consumer complaints must be filed with the Office of Regulatory Staff, which has the responsibility of mediating consumer complaints under the provisions of Articles 1, 3, and 5. If a complaint is not resolved to the satisfaction of the complainant, the complainant may request a hearing before the commission." S.C. Code Ann §58-5-270. However, what the Company calls the PSC's "established method of resolving complaints" is not found in a statute; it is found in the Commission's regulations. Customer complaint regulations for water service are found at 26 S.C. Code Ann. Regs. 103-716 and 103-738. These regulations provide:

> Complaints by customers concerning the charges, practices, facilities, or services of the utility shall be investigated promptly and thoroughly. Each utility shall keep a record of all such complaints received, which record shall show the name and address of the complainant, the date and character of the complaint, and the adjustment or disposal made thereof.

26 S.C. Code Ann. Regs. 103-716; and:

> A. Complaints concerning the charges, practices, facilities, or service of the utility shall be investigated promptly and thoroughly. The utility shall keep records of customer complaints as will enable it and the Commission to review and analyze its procedures and actions. All customer complaints shall be processed by the utility pursuant to 103-716 and 103-730.F.
> B. When the Commission has notified the utility that a complaint has been received concerning a specific account and the Commission has received notice of the complaint before service is terminated, the utility shall not discontinue the service of that account until the Commission's investigation is completed and the results have been received by the utility.

26 S.C. Code Ann. Regs. 103-738.

Substantially similar regulations for customer complaints against wastewater utilities are found at 26 S.C. Code Ann. Regs. 103-516 and 103-538. Nothing in these

regulations indicates that the complaint procedures contained therein are the exclusive means for the Commission's consideration of customer service issues. The process set forth in these statutes and regulations is meant to provide a vehicle for the resolution of individual customer complaints. There is no evidence that either the Commission or the General Assembly intended to foreclose the consideration by the Commission of customer service issues in rate cases, nor is the Commission limited to considering service complaints brought under its individual complaint procedures. Such a reading of these statutes and regulations would lead to an absurd result. Under USSC's interpretation, if a utility received repeated customer service complaints that were resolved through the investigation and mediation of the Office of Regulatory Staff, these issues could not be subsequently considered by the Commission when considering a rate increase. This tortured construction of the law and regulations is incorrect and inconsistent with the Supreme Court's decision in Patton.

The Public Service Commission is within its statutory authority to hold public hearings and consider public testimony. This authority is derived from the General Assembly's broad mandate for the Commission to ascertain and fix just and reasonable standards, classifications, regulations, practices, and **measurements of service** necessary to supervise and regulate the rates and service as well as determine a fair rate of return for public utilities. S.C. Code Ann. §§58-3-140 and 58-5-210 (1976) (emphasis added). While the General Assembly granted these express powers, it declined to instruct the Commission on how to apply them, leaving the means to exercise them to the

Commission's discretion. Testimony by nonparty public witnesses has been recognized by the South Carolina Supreme Court. See Hilton Head Plantation Utilities supra.

a. USSC's rate of return.

USSC claims that the Order unconstitutionally denies it a fair return on its investment since, according to USSC, the evidence of record shows that the Company added $1,507,580 in rate base since its last rate case. Once again, the Company failed to prove its case in a number of particulars. When asked, USSC did not show what items constituted the additional amount in rate base and where the items were located. Without that proof, the Commission could not award rate relief to the Company, nor could it add to the rate base to which the Company is entitled to a fair return. If the Company submits another rate application, and meets its burden of proof, the Commission will certainly consider again what constitutes a fair rate of return on the Company's investment.

The Company's Petition also claims that Order No. 2008-96 results in a confiscatory rate of return on rate base because it effectively allows USSC a return of only 2.58% on property used and useful in providing service to customers in South Carolina. Bluefield Waterworks v. West Virginia, 262 U.S. 679 (1923), and Federal Power Commission v. Hope Natural Gas, 320 U.S. 591 (1944). While the Company is entitled to earn a reasonable rate of return, this right is not unconditional. In this case, the Company has failed to prove that it is entitled to the claimed rate of return and therefore the sufficiency is not in question.

VIII. QUALITY OF SERVICE

USSC further contends that Patton v. Public Service Commission "does not speak to whether quality of service is a proper consideration in arriving at just and reasonable rates." USSC Petition at 17. USSC argues that Patton only allows the Commission to "impose 'reasonable requirements' .... to insure that adequate and proper service will be rendered to customers." Id. USSC further argues that Patton only holds that withholding an increase until deficiencies are corrected "is a proper means by which the Commission may discharge its authority..." Id. USSC's reading of Patton is unduly restrictive. The Patton Court expressly recognized quality of service as a factor that must be considered, stating "[t]he record in this proceeding indicates that the Commission, **in determining the just and reasonable operating margin** for [the applicant], examined the relationship between the Company's expenses, revenues and investment in an historic test period **as well as the quality of service provided to its customers.**" 312 S.E.2d at 259 (emphasis added). USSC argues that, in Patton, "1) customer complaints alone were not held to be sufficient to support the denial of rate relief, 2) objective testimony from a DHEC witness that the utility's facility in that subdivision failed to meet DHEC standards was provided, and 3) only a delay in the availability of otherwise allowable rate relief for service to customers in one subdivision resulted." Id. at 18. However, Patton does not limit the Commission to conditioning prospective rate relief, as USSC suggests. Instead, the case acknowledges that quality of service is a factor for the Commission to consider when setting rates. Patton does not foreclose the possibility that circumstances may warrant the denial of a rate increase due to a utility's failure to prove that it offers adequate customer

service. Id. at 260 (stating "**In this instance**, rather than reduce the rates and charges found reasonable for sewerage service .... because of the poor quality of service, the Commission chose to give the utility company the opportunity and incentive to upgrade the system.") (emphasis added). USSC also argues that the Commission's consideration of "quality of service" is inconsistent with its prior orders evaluating the "adequacy" of a utility's service. The distinction between "quality of service" and "adequacy of service" is a matter of semantics. The Commission's orders all focus on the question of whether customers are receiving the service they deserve.

USSC also complains that the Commission denies rate relief in all of USSC's eighty-two subdivisions based solely on the testimony of customers in four subdivisions. USSC Petition at 18. However, the basis for our decision not to approve the Application was the parties' failure to prove that the proposed rates were just and reasonable. The fact that some of the Commission's concerns arose after hearing public testimony from customers in four subdivisions renders them no less valid and certainly provides no basis upon which USSC is entitled to a different result. In Patton, the Commission was able to condition a rate increase on the Company's compliance with DHEC regulations. Patton, 312 S.E.2d at 260. In the present case, the Commission lacked the necessary information to grant conditional relief of the type granted in Patton.

USSC states that there is no quantifiable objective data or scientific criteria in the record to support a finding that USSC's service is not adequate. USSC further argues that the testimony offered by ORS shows that the service provided was adequate. USSC Petition at 18. This assertion by USSC is a misstatement of the law, based largely upon

USSC's misreading of an unpublished memorandum opinion issued by the South Carolina Supreme Court in 1995 and an ensuing Circuit Court opinion. See Heater Utilities Inc. v. Public Service Commission of South Carolina, Op. No. 95-MO-365 (S.C. S.Ct. filed December 8, 1995), cited in Tega Cay Water Service, Inc. v. South Carolina Public Service Comm'n, Case No. 97-CP-40-923 (Richland County Court of Common Pleas, 1998) ("USSC"). In Tega Cay, the Commission granted the applicant a low rate of return (0.23%), which the Commission claimed was justified by evidence of poor quality of service. Citing to Heater, the Court of Common Pleas reversed the Commission's decision, finding that the only evidence of poor service was the testimony of six customers out of a customer base of about 1,500 and that these six customer complaints, standing alone, were insufficient to support the rate of return issued by the Commission.

Heater and Tega Cay are clearly distinguishable from the case at hand, and further, under Court rules, do not have precedential value in this case. In Heater, the PSC based its denial of the rate increase **entirely** on a finding of poor water quality. The PSC had based its finding of poor quality on the anecdotal testimony of fourteen customers, despite a study conducted by Commission Staff which found the water to be clear and odorless in the subdivisions about which the customers complained. Similarly, in Tega Cay, the PSC based a finding of poor service quality solely upon six customer complaints. In both Heater and Tega Cay, the reviewing courts found that the Commission's rulings were not supported by substantial evidence.

In the present case, the Commission declined to approve rate relief because USSC failed to prove the requested rates to be just and reasonable based upon many factors.

The Commission heard testimony which gave it cause for concern about quality of service issues. However, the Commission's decision to deny a rate increase in these proceedings was ultimately based more on the absence of information provided by the Company than on the testimony of complaining customers.

The Commission's actions in the instant case were based upon much more evidence than existed in Heater, in which this Commission acted solely upon its finding of poor water quality. Here, while the ORS may have concluded that USSC offered adequate service, the Commission found evidence in customer testimony and in the parties' own submissions to suggest otherwise. This finding brought into question the Company's testimony with regard to capital improvements. While the Commission relies upon the ORS to conduct audits and investigations and present its findings to the Commission as an aid to the Commission in making regulatory decisions, it is not obligated to accept ORS's conclusions as a matter of course where other evidence might lead to a different result. It is within ORS's purview to represent the public interest before the Commission, but it is the Commission's authority to deliberate and then judge whether public interest standards are met.

Further, the Heater and Tega Cay cases are not even valid precedent for reference in this case. Rule 239 (d) (2), SCACR. The Company attempts to cite these two cases numerous times as precedent in its Petition. However, such citations are improper under the stated rule. This principle is applicable to the Company's assertion that customer testimony should be deemed unsubstantiated when it is not supported as shown in Heater and Tega Cay. The Company also assumes throughout its Petition that this Commission

denied the Company rate relief solely on the basis of testimony from the Company's customers. Even if one ignores the lack of precedential value of the Heater and Tega Cay cases, those cases are more concerned with the exclusive reliance on customer testimony as direct evidence. In contrast, the present case involves the testimony of customers, combined with Haas' inability to describe the specific cost and location of the claimed improvements, which leads the Commission to question the prudence of the Company's expenditures. This combination of the testimony regarding the lack of capital improvements given by customers, along with the inadequacy of the Company's witness' testimony on the issue, is at the root of the Commission's disagreement with the Company.

The Company also takes exception to this Commission's discussion of the standard of review found in S.C. Code Ann. Section 1-23-380, and states that the consideration of this statute leads to an improper conclusion with regard to the status of its objection. Order at 9-10. To be clear, the Commission considered the testimony of the company's customers because it found their testimony to be relevant and appropriate under the applicable statutory and case law, and because, as explained herein and in the Commission's Order, the Company did not raise valid objections to this evidence. Further, the Company states that the standard of review is irrelevant to the substantive legal requirements for determining the adequacy of a utility's service in reliance upon customer testimony as set out in Heater, Tega Cay, and Patton. The Commission discussed the Supreme Court's standard of review only in the context of discussing the

rationale of these cases and how they apply to the Commission. It was not applying that standard of review in this case.

IX. "GENERAL DISCUSSION" EXCEPTIONS

Seabrook Island Property Owners Association v. SCPSC

Finally, the Company takes issue with several findings made in the "General Discussion" portion of Order No. 2008-96. Order at 18-19. First, USSC disputes the validity of the reference to the Seabrook Island Property Owners Association case, asserting that USSC is not regulated on an operating margin basis as was the utility in Seabrook Island, and USSC did not seek to have its rates set on an operating margin basis in this case. This distinction does not invalidate the citation of this case. S.C. Code Ann. Section 58-5-240 (H) (Supp. 2008) requires that this Commission specify an allowable operating margin in all water and wastewater orders. Therefore, Order No. 2008-96 did specify an operating margin for the Company in Finding and Conclusion No. 21 at page 22. Accordingly, whether the Company requested operating margin treatment or not, it was assigned what we considered to be an appropriate operating margin based on the evidence before this Commission. Seabrook Island Property Owners Association is therefore as applicable to this case as it is to any case in which operating margin treatment was sought.

Second, USSC questions this Commission's conclusion that USSC's "failure to meet its burden of proof in this case, makes it impossible for [the] Commission to determine whether or not the proposed rates...are just and reasonable." The Company contends that this statement is patently incorrect, given the *de minimis* customer

testimony, and the holdings of the South Carolina Supreme Court in the Heater memorandum opinion and other cases cited detailing the requirement for substantial evidence in this case. Yet, it is interesting to note that the Company argued in its previous exception that "the standard of review is irrelevant to the substantive legal requirements for determining the adequacy of a utility's service..." USSC Petition at 19, Section (e). Clearly, the Company cannot have it both ways. We agree, however, that our decisions must be supported by substantial evidence. As explained above, such evidence was not forthcoming from the party with the burden of proof.

X. CONCLUSION

The root of the Commission's many legal disagreements with the Company in this case is its perception of the role and obligations of a regulated utility with a monopoly to provide service to its customers. The Company argues for a system in which customers are not heard from in rate cases and their concerns almost always remain unanswered. The Company argues that the law prohibits the Commission from exercising regulatory oversight and inquiring about matters such as quality of service, or the reasonableness of its rates when it is alleged that neighboring systems are offering comparable service at roughly half the price. The Commission is convinced that the law does not forbid such inquiries, which it views as essential components of public accountability.

Having fully considered the allegations of error asserted by USSC in its Petition, and, as discussed above, the Commission finds those allegations to be totally without merit, with the exception of the DHEC lead violation question. For any remaining allegations of error not specifically discussed herein, such allegations are hereby deemed

denied. Accordingly, the Company's Petition is denied and dismissed, except as noted above.

This Order shall remain in full force and effect until further order of the Commission.

BY ORDER OF THE COMMISSION:

Elizabeth B. Fleming

Elizabeth B. Fleming, Chairman

ATTEST:

John E. Howard

John E. Howard, Vice Chairman

(SEAL)

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

Docket No. 2007-286-W/S

Utilities Services of South Carolina, Inc., ... Appellant,

v.

The South Carolina Office of Regulatory Staff, ... Respondent.

CERTIFICATE OF SERVICE

This is to certify that I have caused to be served this day one (1) copy of **Appellant's Notice of Appeal** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

Florence P. Belser, Esquire
Jeffrey M. Nelson, Esquire
Nanette S. Edwards, Esquire
Office of Regulatory Staff
Post Office Box 11263
Columbia, South Carolina 29211

Clark Fancher

Clark Fancher

Columbia, South Carolina
This 30th day of June, 2009.